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In the Supreme Court of the United States

OCTOBER TERM, 1975

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, ET AL., PETITIONERS

v.

JOHN T. DUNLOP, SECRETARY, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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The petition seeks review of the judgment of the court of appeals affirming standards regulating worker exposure to mixtures containing more than specified percentages of fourteen chemical carcinogens (Pet. App. 1a-13a). Petitioners claim that the court of appeals employed improper criteria for review of the standards, and that the standards are deficient in that they do not impose an objective measure of exposure—whether at zero or some other level—for purposes of control, and do not require monitoring.

1. The standards were promulgated by the Secretary of Labor pursuant to Sections 6(b) and (c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 655(b) and (c)[1], on

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[1]Sections 6(b)(5) and (7) of the Act, upon which petitioners' argument is based, are reprinted at Pet. App. 43a-44a.

January 29, 1974 (39 Fed. Reg. 3756-3797).[2] Their issuance was accompanied by a statement of reasons explaining the basis for the standards and the reasons underlying the policy choices made by the Secretary (Pet. App. 14a-42a).

The Secretary's determination that certain chemicals should be classified as carcinogens (that is, substances known to cause cancer) requiring regulation was based on the criterion that substances shown to cause cancer in two animal species are to be treated as posing an impermissible danger to man until evidence to the contrary is produced. Applying this criterion, the Secretary classified fourteen chemicals as carcinogens.[3]

Having classified substances as carcinogens, the Secretary then adopted "cut-off" levels for the purpose of determining the applicability of regulatory provisions. In the case of eight substances, solid or liquid mixtures containing less than one percent by weight or volume of the substance are excluded from regulation, while in the case of six substances, mixtures containing less than 0.1 percent are

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[2]A temporary emergency standard issued pursuant to 29 U.S.C. 655(c) had earlier been vacated by the court of appeals for failure of the Secretary adequately to state his reasons for issuing the standard. *Dry Color Manufacturers' Association* v. *Department of Labor*, 486 F. 2d 98 (C.A. 3).

[3]The Secretary's classification of the chemical ethyleneimine (EI) as a carcinogen was sustained in *Synthetic Organic Chemical Manufacturers Association* v. *Brennan*, 503 F. 2d 1155 (C.A. 3), certiorari denied, No. 74-789 (March 17, 1975). The classification of all other challenged substances was sustained in the present case (Pet. App. 4a-5a), although the rule regulating one such substance was remanded for correction of defects in the rule-making proceedings (Pet. App. 5a-9a). The parties that challenged the classification of substances in the court of appeals in this case have not sought review in this Court.

excluded (Pet. App. 23a). In support of this mode of regulation the Secretary noted that state regulatory bodies had adopted similar cut-off levels, that those levels were intended to exclude from regulation only minute trace amounts of the regulated substances, and that blanket application of the standards' requirements might create "substantial obstruction * * * of the use of many processes and products * * * about which the record contains very little information" (Pet. App. 22a-24a).

The Secretary considered and rejected petitioners' submission concerning the need for a zero exposure standard[4] (Pet. App. 20a-21a):

> The petition of Oil, Chemical and Atomic Workers Union (OCAW) and Health Research Group (HRG) for an emergency temporary standard on ten substances proceeds on the assumption that any exposure to any amount of a carcinogenic substance must be prevented. Accordingly, it proposes a standard of zero tolerance permitting no exposure whatsoever. This objective would be accomplished by means of a permit system and frequent monitoring and reporting.
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> We agree with the Ad Hoc Committee on the Evaluation of Low Levels of Environmental Chemical Carcinogens that a safe level of human exposure to any of the 14 carcinogens cannot be established by application of present knowledge. But we are not prepared to draw from this state of knowledge the conclusion that such levels do not exist. First, it is the professional opinion of many knowledgeable

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[4]The zero exposure standard proposed by petitioners related to atmospheric concentration. This standard differs from the cut-off levels adopted by the Secretary, which, as shown above, relate to concentration in solid or liquid mixtures.

people that as yet undetermined safe levels of exposure possibly do exist. Also, a conclusion that safe levels do not exist seems questionable in view of other studies, some in the area of carcinogenicity which demonstrated that below a certain amount of a single or cumulative dosage, no detectable harm is caused, or if harm is caused, the extent of such harm will be of no practicable importance because the latency period prior to manifestation of harmful effects will be of greater duration than the normal lifespan of man. Secondly, no possible exposure to the carcinogens under any circumstances could only be guaranteed by a total ban on the manufacture, use (even for cancer research), and transportation of the substances. As long as the substances are used, exposure to some amounts may occur because of breakdown of equipment or human error. Accordingly, the intent of the standards is to reduce exposure of workers to any of the listed substances to the maximum extent practicable consistent with continued use.

With regard to petitioners' request for monitoring, the Secretary explained that because adequate techniques for monitoring atmospheric concentrations of these substances were not available, he had requested the National Institute for Occupational Safety and Health "to develop, on a priority basis, methods for determining qualitative and quantitative amounts of the carcinogens in the workplace" (Pet. App. 28a).

The standards seek to assure employees who work with the regulated chemicals a safe working environment, by prohibiting the use of any of the substances in an open vessel, by requiring negative air pressure where such substances are used to insure that they cannot escape, by providing requirements for protective clothing to be

worn by workers who might be exposed to the chemical, by requiring warning signs and employee education programs, and by requiring medical surveillance of workers.

2. While petitioners assert that the standards are deficient in two specific respects (discussed, *infra*), they also contend that the court of appeals applied an incorrect standard of review in sustaining the Secretary's determinations. But every court of appeals that has reviewed regulations promulgated in informal rulemaking under the Act has recognized that to the extent the Secretary finds facts, they must be supported by substantial evidence; and to the extent that the Secretary exercises what is more akin to legislative judgment, his determination must be reasonable in light of the statutory policies he is charged with effectuating. See, *e.g.*, *Society of the Plastics Industry, Inc.* v. *Occupational Safety & Health Administration*, 509 F. 2d 1301 (C.A. 2), certiorari denied *sub nom. Firestone Plastics Co.* v. *Department of Labor*, No. 74-1185 (May 27, 1975); *Industrial Union Dep't, AFL-CIO* v. *Hodgson*, 499 F. 2d 467, 475-478 (C.A.D.C); *Nat'l Roofing Contractors Ass'n* v. *Brennan*, 495 F. 2d 1294, 1296-1299 (C.A. 7), certiorari denied, 419 U.S. 1105; *Florida Peach Growers Ass'n* v. *Department of Labor*, 489 F. 2d 120, 124, 128-132 (C.A. 5); *Associated Industries of New York State, Inc.* v. *Department of Labor*, 487 F. 2d 342, 352-354 (C.A. 2).

That is precisely the standard of review applied by the court of appeals in this case.[5] This Court has twice refused

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[5]The court of appeals applied the same standard that it had employed in *Synthetic Organic Chemical Manufacturers Association, supra* (Pet. App. 9a-10a). In that case the court of appeals, stating (503 F. 2d at 1159) that its task was to "review for consistency between the Secretary's rule and the statutory language and purpose" and to "determine

to review a contention that this standard of review was improper. See *Synthetic Organic Chemical Manufacturers Association* v. *Brennan*, 503 F. 2d 1155 (C.A. 3), certiorari denied, No. 74-789 (March 17, 1975); *Society of the Plastics Industry, Inc.* v. *Occupational Safety & Health Administration, supra.*

3. Petitioners' contention that the Secretary violated Section 6(b)(5) by not setting "a performance standard, whether at the zero level or some other level" (Pet. 7-8) is based on the assumption that a performance standard is required in every case. But Section 6(b)(5) expressly requires that such performance levels be specified only "[w]henever practicable." Neither petitioners, nor any other party, nor the expert bodies which participated in this rulemaking were able to suggest a numerical exposure level because the requisite data was not available. In view of this record and Section 6(b)(5)'s mandate that standards

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if the Secretary applied the [correct statutory criteria]" (503 F.2d at 1160), held (*ibid.*):

> Judicial review of a §6 standard properly includes at least the following:
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> (1) determining whether the Secretary's notice of proposed rule making adequately informed interested persons of the action taken;
>
> (2) determining whether the Secretary's promulgation adequately sets forth reasons for his action;
>
> (3) determining whether the statement of reasons reflects consideration of factors relevant under the statute;
>
> (4) determining whether presently available alternatives were at least considered; and
>
> (5) if the Secretary's determination is based in whole or in part on factual matters subject to evidentiary development, whether substantial evidence in the record as a whole supports the determination.

be "feasible,"[6] the court's affirmance of the Secretary's decision to adopt a middle ground by requiring stringent protection against all but trace amounts of these substances (Pet. App. 9a-10a) was both reasonable and correct. Cf. *Dry Color Manufacturers' Association* v. *Department of Labor*, 486 F. 2d 98, 108 and n. 18 (C.A. 3); *Industrial Union Dep't, AFL-CIO* v. *Hodgson, supra*, 499 F.2d at 474-479.

Moreover, the standards issued by the Secretary embody objective criteria that promote effective enforcement of the policies of the Act.

4. Finally, petitioners contend that the Secretary violated Section 6(b)(7)[7] by failing to impose a requirement that employers conduct atmospheric monitoring to determine airborne concentrations of these substances in their workplaces.

But in light of the Secretary's finding that numerical exposure limits could not be established, monitoring (even if technologically feasible) would be largely pointless.

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[6]Although petitioners now refer to a zero exposure "or some other level" (Pet. 8) in the rule-making proceedings and before the court of appeals, petitioners contended that a zero level was required. The Secretary rejected this contention, finding that it was not justified by the record and, moreover, could be achieved only by a total ban on use. As the court of appeals held, citing *Industrial Union Dep't, AFL-CIO* v. *Hodgson, supra*, 499 F. 2d at 478, "Congress does not appear to have intended to protect employees by putting their employers out of business * * * " (Pet. App. 10a).

[7]"Where appropriate, such standard shall also prescribe suitable protective equipment and control or technological procedures * * * and shall provide for monitoring or measuring employee exposure at such locations and intervals, and in such manner as may be necessary for the protection of employees." 29 U.S.C. 655(b)(7) (Pet. App. 43a-44a).

Moreover, the Secretary properly found that monitoring techniques that would reliably measure atmospheric concentration of carcinogens were not presently available (Pet. App. 28a).[8]

The Secretary has requested the National Institute for Occupational Safety and Health to develop monitoring techniques on a priority basis. Accordingly, the court of appeals held (Pet. App. 12a) that the Secretary has properly "deferred implementation of monitoring requirements pending further scientific development of methods for so doing."

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8]Petitioners' reliance on the Secretary's asserted disregard for his "own compilation of available monitoring techniques" (Pet. 11 and n. 13) is misplaced. The document relied upon clearly indicated that reliable technology was largely unavailable. Moreover, petitioners were unable to cite any specific reliable monitoring techniques. 38 Fed. Reg. 4038.